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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA IMPOSING DISCIPLINE UPON AN ATTORNEY AS RECOMMENDED BY THE REVIEW DEPARTMENT OF THE STATE BAR OF CALIFORNIA

BRIEF OF APPELLANT

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QUESTION PRESENTED

1. Whether, for purposes of lawyer discipline, Rule 2-101 of the Rules of Professional Conduct of the State Bar of California and the Standard promulgated by the Board of Governors of the State Bar pursuant to such rule, which create a presumption that "testimonial" advertising by attorneys is false, misleading or deceptive, violate the Free Speech Clause of the First Amendment of the Constitution of the United States because:

a. they impermissibly shift the burden of proof to the accused attorney to show that the "testimonial" advertising is not false, misleading or deceptive; and

b. as applied, they constitute a "blanket ban" on "testimonial" advertising?

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ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF CALIFORNIA

BRIEF OF APPELLANT MARK H. ORING

OPINIONS BELOW

On June 2, 1987, the Review Department of the State Bar of California convened "In the Matter of Mark H. Oring," and resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and/or Rule 2-101(D) was unconstitutional. A copy of the Minutes of the Review Department are printed in Appendix "A" to the Jurisdictional Statement, App. 1.

This resolution overruled the December 5, 1984, decision of the Hearing Panel of the California State Bar Court, which unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. A copy of the panel's findings of fact and recommendation is printed in Appendix "B" to the Jurisdictional Statement, and a transcript of that hearing is included as Joint Appendix "B" to this Brief, J.A. 2.

Appellant petitioned the California Supreme Court for a writ of review which was denied October 28, 1987. The order denying the petition is reproduced in Appendix "C" to the Jurisdictional Statement, App.7.

JURISDICTION

This appeal arises from a disciplinary action brought by the State Bar of California against the Appellant. On June 2, 1987, the Review Department of the State Bar of California resolved that Appellant should be publicly reproved. The California Supreme Court entered its order denying Appellant's petition for writ of review on October 28, 1987, and thus upheld the constitutionality of the California State Bar's Rule of Professional Conduct, 2-101 and the contested Standard.

Appellant filed his notice of appeal with the California Supreme Court on January 7, 1988. A copy of said notice is printed in Appendix G to the Jurisdictional Statement, App. 21.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). As in *Lathrop v. Dohahue*, 367 U.S. 820 (1961). Rule 2-101 and the Standard promulgated by the Board of Governors pursuant to such rule, represent state "statutes," legislative in character, the constitutionality of which appellant has challenged at each stage of the proceedings below. Since Appellant has been penalized for violating these provisions, jurisdiction by appeal is proper.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law *** abridging the freedom of speech, or of the press ***"

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-101 of the Rules of Professional Conduct of the State Bar of California:

Professional Employment

This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

(A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:

(1) Contain any untrue statement; or

(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse, deceive or mislead the public; or

(3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal

Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

. . .

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

Standard adopted by the California State Bar Board of Governors pursuant to Rule 2-101:

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

STATEMENT OF THE CASE

HOW THE FEDERAL QUESTION WAS RAISED

During the proceedings in the lower tribunals and again in the California Supreme Court, Appellant had

properly drawn in question the validity of a state "statute" on the ground that it had violated the First and Fourteenth Amendments. Although the lower tribunal held in Appellant's favor, a majority of the Review Department of the State Bar concluded the contested provision was valid. The California Supreme Court denied Appellant's petition for writ of review. This Court noted probable jurisdiction on June 30, 1988.

STATEMENT OF FACTS

Appellant, Mark Oring, and his then partner, David Grey, engaged in a radio advertising program for professional employment which used the following statement of Sharon S.:

"I was rear ended on the San Diego Freeway and all my medical bills were piling up and *the insurance company was giving me a hard time, constantly harassed me, just all in all gave me a bad time.* I contacted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in Court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. *They hadn't liked the way the insurance company had treated me and they wanted to take them to trial* and suddenly the insurance company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that." (emphasis added).

This message was followed by an announcer adding:

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey and Oring, 558-8000. There's no charge for consultation. 558-8000."

Although there were no consumer complaints against the advertising, an informal preliminary investigation was held before Referee Jerry Craig on November 10, 1981. Referee Craig made the following determination: (1) the advertisement was a testimonial; (2) The presumption that a testimonial was presumed to violate Rule 2-101(D) was unconstitutional; (3) There was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading, and; (4) as such, there were insufficient facts to warrant further proceedings. A copy of Referee Craig's decision is printed in Joint Appendix "A" to this Brief, J.A. 1.

The State Bar requested further proceedings from the Board of Governors' Committee on Adjudication and Discipline contending that an Investigation Department Referee was not authorized to determine the constitutionality of the Rules of Professional Conduct.

Inasmuch as the State Bar failed to take any action for 20 months, Oring's then partner, David Grey, filed a Petition for Review of State Bar's action with the California Supreme Court in November, 1983 (LA 31386). On March 28, 1984, that court issued its order denying the Petition but ordered the State Bar to proceed or dismiss the case. In April, 1984, the State Bar filed a Notice to Show Cause.

On December 5, 1984, the parties entered into the following stipulations:

(1) A "Stipulation as to Facts and Disposition" including these factual agreements:

> "4. The Statement of Sharon S. *were extemporaneous and were true and reflected her actual experience as a client* of Grey and Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and *neither they nor any lawyer from their office was present at the time the radio spot was recorded.*" (Emphasis added).
>
> "It is acknowledged and understood by the parties hereto that the within Stipulation As To Facts and Disposition *is subject to review* by the Review Department of State Bar Courts and the California Supreme Court. It is further acknowledged and understood by the parties that the within stipulation as to recommended disposition is *not binding* upon the California Supreme Court." (Emphasis added).

The parties agreed to a punishment consisting of a public reproval, subject to the second stipulation below. (A copy of the "Stipulation as to Facts" is printed in Appendix "D" to the Jurisdictional Statement, App. 8.)

(2) A "Stipulation Re: Filing and Force and Effect of 'Stipulation as to Facts and Disposition Etc,' " wherein it was agreed that the Stipulation as to Facts and Disposition would be of no force or effect unless and until a final disciplinary order was made and entered against Appellant's then partner, David Grey. Further, such Stipulation stated that Appellant would not be disciplined if his then partner was exonerated. (A copy of the "Stipulation Re: Filing and Force and Effect o. 'Stipulation as to Facts and

Disposition' " is printed in Appendix "E" to the Jurisdictional Statement, App. 12.)

On December 5, 1984, a formal hearing was held before three referees, Lloyd Reed, James L. Kellner, and Barry J. Post. The State Bar presented no evidence. Upon consideration of the file, all papers filed on behalf of all parties, and oral argument, the panel unanimously agreed that Appellant was not culpable because Rule 2-101 was unconstitutional. (See Appendix "B" to the Jurisdictional Statement, App. 5.) (A copy of the transcript of the hearing before this panel is printed in Joint Appendix "B" hereto, J.A. 2.)

Pursuant to the State Bar's request for review, a hearing was held before the Review Department of the State Bar Court on August 28, 1985. By a vote of 5-4, with three referees abstaining, Standard (2) was held to be constitutional as applied to Appellant's partner, David Grey, and it was resolved that David Grey be publicly reproved. (See Appendix "F" to the Jurisdictional Statement, App. 14.)

After the Review Department's disciplinary order regarding David Grey became final, the twelve member Review Department reconvened In the Matter of Mark H. Oring, and on June 2, 1987, a majority, 8 members, resolved as follows:

> "*RESOLVED* that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted."

Four referees voted "NO" on the adoption of such resolution, based upon their belief that the presumption and/or Rule 2-101(D) was unconstitutional. (See Appendix "A" to the Jurisdictional Statement, App. 1.)

By letter dated July 7, 1987, the Presiding Referee of the State Bar Court notified Oring that he had been publically reproved and that such reproval would be noted in the public records of the State Bar. The letter also advised Oring of his right to seek California Supreme Court review of the State Bar's action and enclosed copies of the California statutes and rules governing Petitions for Review in the Supreme Court. (A copy of the letter imposing the public reproval and enclosures are printed in Joint Appendix "E" to this Brief, J.A. 18.)

Appellant petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied the petition, thereby upholding the disciplinary rules against Appellant's challenge. (See Appendix "C" to the Jurisdictional Statement, App. 7.)

The State Bar's Committee Report to its Board of Governors provides what is allegedly the State Bar's reasoning behind the presumption at issue here.

> "Testimonials are inherently deceptive and misleading because past performance of an attorney is no indication of future performance, and because no lawyer can guarantee the results of any legal action." "Advertising of acquittals or large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high if the services of this particular attorney are obtained, and ignores the importance of facts, applicable law, and an attorney's selective choice of clients in determining the outcome of a case." (See State Bar Motion to Dismiss or Affirm, p. 22.)

Recent Developments:

In December 1987, the State Bar adopted and forwarded to the California Supreme Court for approval a new proposed rule and standards regarding testimonials. Standard 2 provides that testimonials are included in communications which are presumed to be false, misleading or deceptive, "unless such communication also contains an express disclaimer such as 'this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.' " (A copy of the proposed rules and standards is printed in Joint Appendix "C" hereto, J.A. 8.)

The California State Bar report submitted with the new proposed rules provides, in pertinent part:

> "The recent rejection of the certiorari petition in *Grey v. State Bar of California* . . . certiorari denied 107 S.Ct. 885 (Jan. 1, 1987) suggests that the United States Supreme Court is, at least presently, willing to permit states to adopt a fairly strong pro-regulation standard in weighing the competing interests of attorneys and the public;"
>
> . . .
>
> "Standard (2) would continue the protection afforded by existing standard (2), which provides that communications which contain testimonials or endorsements violate the rule. However, this standard had been amended to provide that such a communication would not be *presumed* to violate the rule if a disclaimer such as that quoted in the standard were included in the communication. Of course, such a communication may violate the rule even if a disclaimer is included (e.g. a communication containing a testimonial which included false statements)."

A copy of this State Bar report is printed in Joint Appendix "D" hereto, J.A. 12.

SUMMARY OF ARGUMENT

Under California law as it now exists, an attorney who utilzes testimonial advertising must bear the burden of proving that his advertisement is not false, deceptive or misleading. Appellant, Mark H. Oring, was publicly reproved for utilizing a non-deceptive, admittedly truthful testimonial radio advertisement which informed the public about a client who received a settlement because of insurance company "bad faith" practices. Under the governing principles this Court has clearly enunciated in prior commercial speech decisions, the judgment imposing a public reproval upon the Appellant cannot stand.

In *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988), this court stated the general rule regarding the constitutionality of commercial speech restrictions as follows:

> " 'Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion- . . . may be no broader than reasonably necessary to prevent the' perceived evil." ___ U.S. ___, 108 S.Ct. at 1921. (Citations omitted.)

Testimonial advertising is subject to First Amendment protection because it is not inherently misleading. It

serves the same important communicative functions this Court set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), attracting the audience's attention to the message, perhaps because someone other than the advertiser himself is promoting the product or service in question, and imparting information directly. Here, the advertisement informed the public about a cause of action based on an insurance company's breach of the covenant of good faith. *Zauderer*, 471 U.S. at 646.

While the current ABA Model Code would seem to preclude such advertising (Section 7.1), it permits the advertisement of names of regularly represented clients. (Section 7.2). But the listing of a regular client, e.g., I.B.M., is a tacit endorsement.

Moreover, testimonial advertising is the 20th century equivalent of the traditional method of obtaining clients based on reputation in the community. *Bates v. State Bar of Arizona*, 433 U.S. at 374, n. 30 (1977); Murdock and Linenberger, *Legal Advertising*, 16 *Land and Water Law Review* 627, 677).

The testimonial at issue here is subject to First Amendment protections because radio advertising should not be subject to any lesser degree of protection than that afforded print media. In *In re Petition of Rule of Court*, 564 S.W.2d 638, 643 (1978), the Tennessee Supreme Court observed that there were 40 million functionally illiterate American citizens, and stated "[i]f the public is to be served by lawyer advertising, illiterates and functional illiterates . . . must have a means of access to that advertising." Based on this sound reasoning, Rule 7.2 of the 1983 Model Rules of Professional Conduct of the

American Bar Association permits radio and television advertising.

The testimonial here did not mislead the public. The California State Bar stipulated that the testimonial at issue here was true, and an advertisement's truth is relevant to the issue of deception. See, *In re R.M.J.*, 455 U.S. 191 at 203 (1982). Further, although there has never been a finding that the advertisement in this case is misleading, the effect of the presumption here impermissibly punishes Appellant "in the absence of a finding that his speech was misleading." *In re R.M.J.*, 455 U.S. 207.

The advertisement is not of the type that "unduly emphasizes trivial or 'relatively uninformative fact[s]' " *Shapero, supra* 108 S.Ct. at 1925. It tells the true story of a woman who was "rear ended" in an automobile accident and constantly harassed by the insurance company involved. Like the information regarding the fact that the statute of limitations on filing lawsuits against the maker of the Dalkon Shield might not as yet have run (*Zauderer*, 471 U.S. at 640), this information is of vital interest to consumers because it tells them about California's "bad faith" cause of action. *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691 (1979).

The State's asserted interest in regulating testimonial advertising is said to be the prevention of false, deceptive and misleading advertising. While the State Bar of California has an interest in preventing attorney practices which are '[r]ife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud' " (*Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 at 1922), testimonial radio advertisements are

not among such practices. The "record in this case fails to reveal a single instance" of actual experience demonstrating the advertisement at issue here was deceptive. *Zauderer*, 471 U.S. at 660 (Brennen, J., concurring and dissenting). And the California State Bar Committee Report contains the cursory and "highly speculative" arguments that Justice Brennan deemed "an unacceptable substitute for the reasoned evaluation that is required when regulating commerical speech." *Id.* at n.4.

The presumption that any "testimonial" is misleading is broader than reasonably necessary to prevent the perceived evil and is contrary to this Court's statement that one seeking to uphold a restriction on commercial speech should bear the burden of proving that such speech is unprotected. See, e.g., *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983).

The presumption that "testimonials" are misleading is not the "preferred remedy" (*In re R.M.J.*, 455 U.S. 191 at 201 (1982)), because it serves to prevent the disclosure of information, rather than promote such disclosure. And both *In re R.M.J.* and *Shapero* suggest inserting disclaimers or requiring filing of a copy of the advertisement with the State for prior approval, as less onerous alternatives. See *In re R.M.J.*, 455 U.S. at 206. Since "[t]here is no indication in the record of a failed effort to proceed along such a less restrictive path" (*Id.*), the presumption at issue here violates the First Amendment.

Additionally, the effect of the presumption that testimonials are misleading fails to afford an attorney due process. As in *Speiser v. Randall*, 357 U.S. 513, 562 (1958), "[t]he vice of the present procedure is that, where the

particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterance will be penalized." Unlike other less burdensome alternatives, it "forces [an attorney] to steer far wider of the unlawful zone" *Id.* and punishes him even when the evidence indicates that it is as likely as not that his advertising is not misleading. *Mullany v. Wilbur*, 421 U.S. 684 at 703 (1975).

ARGUMENT

Since the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which this Court held that the First Amendment precludes certain forms of regulation of purely commercial speech, this Court has had occasion to address the constitutionality of a variety of restraints on advertising and solicitation by attorneys. See *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for advertising consisting of truthful "testimonials" by former clients, and whether the State may establish a presumption that any such "testimonials" are misleading. Under the governing principles this Court has clearly

enunciated in *Bates, In re R.M.J., Zauderer, Shapero*, and other commercial speech decisions, the California State Bar's presumption that testimonial advertising is deceptive or misleading cannot stand.

Last term, in *Shapero*, this Court stated the general rule in the context of commercial advertising by lawyers to be as follows:

> " 'Commercial speech that is not false or deceptive and does not concern unlawful activites . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion . . . may be *no broader than reasonably necessary to prevent the' perceived evil.*" ___ U.S. ___ 108 S.Ct. at 1921; *emphasis added* citations omitted.

The State Bar regulations here are far broader than necessary to achieve the governmental interest asserted. Furthermore, they impose a constitutionally impermissible burden upon the advertiser, who is required to assume the burden of establishing the protected nature of the communication, in violation of both the First and Fourteenth Amendments. *Speiser v. Randall*, 357 U.S. 513 (1958).

I.

LAWYER ADVERTISING IS SUBJECT TO FIRST AMENDMENT PROTECTIONS.

Primarily because of the importance to the consumer of the free flow of commercial information, this Court

first recognized that commercial advertising is entitled to First Amendment protections in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-771 (1976). From the time of that decision until the present, this Court has many times spoken about the importance of the free flow of commercial information and the policy that consumers should be entitled to more, rather then less, information.

This Court first applied these policies to attorney advertising in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), holding that attorney advertising cannot be subject to blanket suppression but that advertising that is false, deceptive, or misleading may, of course, be subject to restraint. 433 U.S. at 383. Bates' "legal clinic" advertisement offering "very reasonable" prices was held to be protected advertising. The reasoning in *Bates*, upholding the free dissemination of truthful information regarding attorney's services, applies with equal force to the Court rule and testimonial at issue here.

In *In re R.M.J.*, 455 U.S. 191 (1982), this Court applied the four-part test set forth in *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980),[1] holding that an attorney could not be disciplined

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[1] This four-part test was described as follows:
"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

for certain deviations from the precise listings of areas of practice which were permitted by the Missouri Bar and for identifying the jurisdictions in which he was licensed to practice. Even though identifying jurisdictions of practice "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court" (455 U.S. at 205), this Court held the communication was protected because "[t]here is nothing in the record to indicate that the inclusion of this information was misleading.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court held the state of Ohio could not ban advertisements containing illustrations or advice and information regarding specific legal problems. The State's contention that illustrations were inherently deceptive and difficult to police was deemed insufficient to justify a blanket ban on such advertising.

And in its latest attorney advertising decision, *Shapero v. Kentucky Bar Association*, ___ U.S. ___, 108 S.Ct. 1916 (1988), this Court held that the state of Kentucky could not categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthfull and nondeceptive letters to potential clients known to face particular legal problems.

Based on this Court's prior decisions, in determining the constitutionality of the California State Bar's presumption that testimonial advertising is misleading, we must first determine whether testimonial advertising is inherently misleading or whether the record demonstrates that such form of advertising has, in fact, been

deceptive. *In re R.M.J.*, 455 U.S. at 202. As we shall demonstrate below, testimonial advertisements are not inherently likely to deceive since they can be truthful and informative, and the record is devoid of any evidence or findings to the effect that the testimonial advertisement at issue in this case is deceptive.

A. TESTIMONIAL ADVERTISING IS SUBJECT TO FIRST AMENDMENT PROTECTIONS BECAUSE IT IS NOT INHERENTLY MISLEADING.

Among this Court's relevant cases, perhaps the closest analogy to California's presumption against testimonials was Ohio's ban on illustrations at issue in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). There, the Office of Disciplinary Counsel stipulated that the information and advice concerning Zauderer's advertisement was not false, fraudulent, misleading, or deceptive and "that the drawing was an accurate representation of the Dalkon Shield."[2]

Like California's presumption that testimonials are misleading, etc., Ohio restricted the use of illustrations in advertising, alleging that they were inherently deceptive;

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[2] Although the drawing was an accurate picture and the parties stipulated that the advertisement was not deceptive, the drawing was claimed to deceive the public. Likewise, here, although the State Bar of California stipulated that Oring's advertisement was extemporaneous, true and reflected the client's actual experiences, the State Bar claims that his advertisement is misleading.

yet, this Court held the First Amendment did not allow for a "blanket ban" on illustrations, finding that the use of illustrations serves important communicative functions. Such advertising "attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." 471 U.S. at 647.

Likewise, testimonial advertising serves these same important communicative functions, attracting the audience's attention to the message, perhaps because someone other than the advertiser himself is promoting the product or service in question. Such advertising also imparts information directly, particularly where, as here, the advertisement informs the public about a cause of action based on an insurance company's breach of the covenant of good faith.

The effect of testimonial advertising on the legal profession has been considered on numerous occasions. While the current ABA Model Code would seem to preclude testimonials (Section 7.1), it permits the advertisement of names of regularly represented clients. (Section 7.2). Such a distinction makes no logical sense. Wouldn't the list of corporate clients be used to actually demonstrate the lawyer's "past performance," and guarantee future performance, more than the testimonial at issue here? Certainly, a potential client would be more impressed by an advertisement stating that an attorney represents the largest corporations in the United States, e.g., IBM, United Air Lines, Standard Oil of Ohio, rather

than by hearing the "anonymous" story of a satisfied client.[3]

Actually, the testimonial here is more informative than a listing of regularly represented clients because it supplies information about "bad faith" insurance practices, and this Court has always looked with favor upon advertisements that serve to inform the public about their legal rights and remedies. See, e.g., *Zauderer*, 471 U.S. at 646: "The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising – *indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising.*" (emphasis added).

Commentators have concluded that testimonials "greatly help consumers." Moss, *supra* at 621. Yet, the California State Bar is concerned that a statement of satisfaction by a former client will mislead the public into believing that similar results can be obtained for them. (See Committee Report to the Board of Governors of the State Bar, Appellee's Motion to Dismiss or Affirm, p. 22 and Statement of the Case, supra).

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[3] See, Moss, *The Ethics of Law Practice Marketing*, 61 *Notre Dame Law Rev.* 601, 619 (1986): "It is clear that the Model Rules continue to draw a distinction between listing regularly represented clients on one hand, and endorsements on the other, although the reason for the distinction may be difficult to perceive in some instances. . . . The listing of a regular client is a tacit endorsement and an implicit claim of competence, if not of expertise, where the client is the kind who obviously could command the highest quality legal assistance in a specialized area of the law."

As stated in Moss, supra, at 621, "[t]here seems to be no proof justifying this assumption. *If the public were that easily seduced and manipulated, then we would look with similar concern at the commonplace television advertising of insurance companies whose clients, standing amid the wreckage of homes recently blown away by tornadoes, tell us how happy they are to have been insured by the advertiser.*" (*Emphasis added.*) No reasonable person would believe that the insurance company testimonial is a "guarantee."[4]

Since testimonial advertising does not involve the immediate "yes-or-no" response required by virtue of the overbearing in-person solicitation in *Ohralik*, consumers can verify the information presented in the advertisement simply by consulting other sources. One noted commentator has stated:

> "Paternalistic judgments of the consumer's ability to evaluate subjective information are unnecessary. In fact, an experiment involving legal advertising found that practitioner attributes . . . had no significant effects on the purchase probabilities or attitudes of respondents." Murdock, *supra* at 677, see also, Kuehl and Ford, *The Promotion of Medical and Legal Services: An Experimental Study, Contemporary Marketing Thought*: 1977 Educator's Proceedings 39-44 (Greenberg and Bellenger, eds. 1977).

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[4] Testimonials by famous personalities are used to promote a multitude of products, e.g., Diet Pepsi (Mike Tyson, boxing), McDonalds (Kareem Abdul Jabar, basketball), Cover-Girl makeup (Christie Brinkley, model). Would a reasonable woman believe she is guaranteed to look like Christie Brinkley simply because she uses Cover-Girl products?

The *evidence*, then, demonstrates that testimonials depicting a practitioner's attributes are not misleading or deceptive and do not significantly affect purchase probabilities of a consumer.[5] Conversely, the source of the information, e.g., the fact that the attorney represents IBM, is said to significantly affect purchase probabilities. *Id.*

The courts have long recognized these realities as well. The eminent Judge Learned Hand, commenting on testimonials in *Moretrench Corporation v. Federal Trade Commission*, 127 F.2d 792, 795 (2nd Cir. 1942), stated:

> "It is extremely hard to believe that any buyers . . . could be misled by anything which was patently no more than the exuberant enthusiasm of a satisfied customer . . . [i]t is . . . hard to imagine how anyone reading [the testimonial] could have understood it as more than puffing."[6]

Certainly, the statements of Sharon S., which were extemporaneous and true, were simply this same "exuberant enthusiasm of a satisfied customer."

In *Northam Warren Corporation v. Federal Trade Commission*, 59 F.2d 196 (2nd Cir. 1932), the court overturned a cease and desist order of the F.T.C., holding that it is not misleading to fail to indicate that an "endorser" was paid

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[5] The State Bar has thus far presented absolutely no evidence supporting its claim that "[t]estimonials are inherently deceptive and misleading. . . ."

[6] See, also, *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937), which involved the use of *fictitious testimonials*. The testimonial at issue here was stipulated to be truthful.

for his indorsement because "[i]t is doubtful if the public is gullible enough to believe that such testimonials are given without compensation." *Id.* at 197. As Judge Manton reasoned:

> "While the testimonials, if having merit, may tend to increase the volume of business, still, if an honest opinion is expressed under the signature of the giver of such testimonial, the public cannot be presumed to be induced to purchase the petitioner's products in any way or manner that might be said to divert trade from competitors who do not use testimonials in advertising their products." *Id.* at 197.

This opinion, again, stresses the anti-paternalistic approach that has long been taken by the courts concerning testimonial advertising.

And at least one State Supreme Court has questioned the validity of a ban on testimonial advertising in light of this Court's holding in *Zauderer*. See *Jones v. Louisiana State Board of Dentistry*, 483 So.2d 140 (La. Supreme Court 1986).

The traditional method of obtaining clients was through word-of-mouth, i.e., reputation in the community. *Bates*, 433 U.S. at 374, n. 30; see, also, Note, *Bar Restrictions on Dissemination of Information about Legal Services*, 22 *UCLA L. Rev.* 483, 500: "Traditions which formed the basis of anti-advertising rules presumed that a potential client knew the reputations of neighborhood lawyers and could make an informed selection . . . "[7] Yet, the kind

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[7] See, also Munford, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 *Virginia L.Rev.* 1135 at 1152.

of testimonial at issue here is, in effect, the modern-day equivalent of word-of-mouth referrals, simply conveying it to many more people than is possible by individual referrals alone. (Murdock and Linenberger, *Legal Advertising*, 16 *Land and Water Law Review* 627, 677) This analogy especially holds true where, as here, the client's statements made by Sharon S. were extemporaneous and true.

Attracting clients because of outstanding professional reputation serves important functions, including encouraging the attorney to do a better job for present clients in order to attract future clients, and placing of intermediaries between an attorney and his potential clients.[8] Munford, *supra*, at 1152. The testimonial at issue here serves these same functions.

Finally, the Federal Trade Commission has actually proposed guidelines for testimonial and endorsement advertising which are relevant and instructive here. 16 C.F.R. 255 *et seq*. Endorsements must reflect honest opinions and beliefs of the endorser and may not contain deceptive representations. 16 C.F.R. 255.1. The F.T.C. has not seen fit to ban testimonials, and this Court has previously looked for guidance to the F.T.C.'s efforts to eliminate deceptive practices in advertising (see *Zauderer*, 471 U.S. at 645). Testimonials, which may include an infinite

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[8] Since the in-person "intermediary" knows or has dealt with the attorney, it is said that he may have more accurate information than advertising may convey. But Sharon S. also had this more "accurate information" based on her personal satisfactory experience with the Appellant.

variety of information and opinions, are simply not inherently deceptive, and accordingly should be recognized as protected speech.

B. THE TESTIMONIAL AT ISSUE HERE IS SUBJECT TO FIRST AMENDMENT PROTECTIONS BECAUSE (1) RADIO ADVERTISING SHOULD NOT BE SUBJECT TO A LESSER DEGREE OF PROTECTION AND (2) THE TESTIMONIAL HERE IS NOT MISLEADING.

1. THERE IS NO DISTINCTION BETWEEN THE PROTECTIONS THAT SHOULD BE AFFORDED LAWYERS WHO ADVERTISE ON RADIO OR TELEVISION AND THOSE WHO UTILIZE PRINT MEDIA

Although neither *Bates v. The State Bar of Arizona*, 433 U.S. 350 (1977), nor its progeny specifically addressed the propriety of electronic advertising, First Amendment freedom of speech protection cannot apply to certain media and not to others.[9]

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[9] This Court's opinion in *Bates* did appear to leave the issue open by commenting: "And the special problem of advertising on the electronic broadcast media will warrant special consideration." (*Bates*, supra, at page 384). See also, dissent of Justice O'Connor in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 673, n.1.

Although the prior lawyer advertising cases decided by this court did not deal with broadcast media, this Court observed in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 670 that the Federal Trade Commission has not found the elimination of deceptive uses of visual media in advertising to be an impossible task. See also, *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

At least two state Supreme Courts have had occasion to deal with the issue of electronic media advertising by lawyers since *Bates*. In *In re Petition of Rule of Court*, 564 S.W.2d 638, 643 (1978), the Tennessee Supreme Court observed that "[t]his [freedom of speech] protection would be fragile indeed if it were only applied to certain media and not to others. Advertising is advertising irrespective of the devise or instrumentality employed."

The Supreme Court of Tennessee went on to point out that there were 40 million functionally illiterate American citizens,[10] and concluded that:

> "It is evident that a large segment of our society cannot profit from print media publication and must rely upon the electronic broadcast media. Again, if the public is to be served by lawyer advertising, illiterates and functional illiterates, along with the non-sighted, must have a means of access to that advertising."[11]

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[10] See, Chamberlain, *"Lawyer Advertising, Subject of Concern"*, NLADA Washington Memo 4 (Sept. 1977); Report to the Board of Governors, by Task Force, 46 *U.S.L.W.* 1,2 (August 23, 1977).

[11] *Grievance Committee For the Hartford-New Britain Judicial District v. Trantolo*, 192 Conn. 15, 470 A.2d 228 (1984), is in accord because:

> "Some members of our society are functionally illiterate. Many others, because of handicaps, financial circumstances, or personal preference, do not avail themselves of printed material. Thus television and radio are the informational media choice for many, and of necessity for others. To restrict the advertising of legal services to those

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The American Bar Association now recognizes the legitimacy of radio and television advertising by lawyers. Rule 7.2 of the 1983 Model Rules of Professional Conduct of the American Bar Association provides:

> "Rule 7.2 Advertising
>
> (a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through . . . radio or television . . . "[12]

Based on the foregoing, radio advertising, like other forms of commercial advertising, is subject to First Amendment protection.

2. THE TESTIMONIAL AT ISSUE HERE IS ADMITTEDLY TRUE, NOT MISLEADING AND SERVES AN IMPORTANT PUBLIC FUNCTION.

In determining whether an advertisement is misleading, courts first consider its literal meaning and then determine whether it conveys any implied message beyond its literal meaning. *Avis-Rent-A-Car System, Inc. v.*

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> who read published materials would deny nonreaders important information with no corresponding benefit to them or any other segment of society."

[12] The Comment to this rule recognizes that "[t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising therefore would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."

Hertz Corp., 782 F.2d 381 (2d Cir. 1986). For all the reasons discussed below, the advertisement in this case is not misleading.

The State Bar stipulated that the advertisement was true. See, *Zauderer*, 471 U.S. at 639. Undoubtedly, the issue of truth is relevant to the issue of deception. See, *In re R.M.J.*, 455 U.S. at 203: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." Thus, the fact that the advertising is true certainly presents, at the very least, evidence that the advertisement is not misleading. Additionally, there has never been a finding that the advertisement in this case is misleading.[13]

The advertisement is not of the type that "unduly emphasizes trivial or 'relatively uninformative fact[s]' " *Shapero, supra* 108 S.Ct. at 1925. It tells the true story of a woman who was "rear ended" in an automobile accident and thereafter constantly harassed by the insurance company involved. *Because of this harassment, her attorney eventually obtained an additional settlement for the client. Certainly, this information is not like the trivial or relatively*

[13] The Local Administrative Committee determined that there was no evidence produced by the State Bar that suggested that the advertisement was in fact misleading. (See Joint Appendix "A") The State Bar Hearing Panel refused to determine whether the advertisement was misleading (See Jurisdictional Statement, Appendix "B"), and the State Bar Review Department made no finding but simply relied on the fact that "Respondent failed to present evidence sufficient to rebut [Rule 2-101(D)'s] presumption." (See Jurisdictional Statement, Appendix "F" (App. 17)).

uninformative information presented in In re R.M.J. (lawyer's statement that he was a member of the Bar to the Supreme Court of the United States). It actually informs the public about breaches of the covenant of good faith by insurance companies and about the basis for bad faith liability. See, *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 928, 148 Cal. Rptr. 389 (1978) [nature of insurance company's acts, i.e., harassment, considered in determining punitive damages]. Undoubtedly, like the information regarding the fact that the statute of limitations on filing lawsuits against the maker of the Dalkon Shield might not as yet have run (*Zauderer, supra*), this information is of vital interest to consumers. Being informed of the possibility of a cause of action for breach of the covenant of good faith by an insurance company is, undoubtedly, important. Otherwise, the vast majority of consumers might be abused by insurance companies because of ignorance, and this abuse is what led to "bad faith" causes of action in California. See, e.g., *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal.Rptr. 389. Thus, the testimonial at issue here "serves individual and societal interests in assuring informed and reliable decision-making." *Bates*, 433 U.S. at 364.

The State Bar makes numerous contentions in its Motion to Dismiss or Affirm (at pp. 14-24), most of which deal with the alleged deceptive nature of the advertising.[14] Yet, as we shall demonstrate, the Bar's contentions lack merit.

[14] The State Bar baldly asserts that:
"Sharon S.'s case was unique and that uniqueness was the set of underlying facts which gave rise to a bad faith cause of action against the defendant's insurance company. This

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If bad faith actions were "unique," California would not be in need of the statutory scheme it has implemented in order to combat bad faith. See Cal. Ins. Code section 790.03. To date, there have been hundreds of California appellate court decisions dealing with issues arising out of bad faith litigation. See *Shepard's California Citations*, Codes, Statute Edition, Part 4, 1988, Insurance Code Section 790.03[15]. And, Continuing Education of The Bar courses in California have featured special programs on "Bad Faith Insurance Litigation" (See, footnote 16, infra.).

Further, the California Supreme Court, in *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691 (1979), has acknowledged that "bad faith" is a matter of public interest.

> " 'The insurer's obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. . . .The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust.' . . . Furthermore, *the*

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factual pattern is seldom, if ever, present in most accident cases and the cause of action that Sharon S. had (and the resulting "double" recovery) are just not available to most prospective litigants." (Motion to Dismiss or Affirm, p. 16-17).

[15] The number of *appellate* cases cited therein would, presumably, be far less than the number of cases filed in trial courts throughout the State of California, not to mention cases filed in other jurisdictions that permit bad faith actions.

> *relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position." Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d at 820-821.[16]

Certainly, the devastating effects of insurer's bad faith, coupled with the inherent imbalance in the relationship between an insured and insurer, are such that the public has a need to be informed about "bad faith."[17]

The effect of the presumption here punishes Appellant "in the absence of a finding that his speech was misleading" (*In re R.M.J.*, 455 U.S. 207), thereby violating the protections afforded by the First Amendment.

C. THE STATE'S INTEREST HERE IS NOT AS COMPELLING AS IN OHRALIK, AND THE PRESUMPTION AT ISSUE IS NOT REASONABLY RELATED TO THE PROMOTION OF THE STATE'S INTEREST IN AVOIDING FALSE, MISLEADING OR DECEPTIVE ADVERTISING.

The State asserted interest in regulating testimonial advertising is said to be the prevention of false, deceptive

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[16] See, also, "Bad Faith Insurance Litigation", California Continuing Education of the Bar, Regents of the University of California (1985) which has observed that "[a]s the doctrine of bad faith has evolved, the nature of insurance has become more clearly seen as an instrument of social policy, rather than simply a private contract between two parties of essentially equal standing."

[17] Indeed, a primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance (See, e.g. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 148-150 (1967) (opinion of Justice Harlan); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *NAACP v. Button*, 371 U.S. 476 (1963); *Banzhaf v. F.C.C.*, 405 F.2d 1082, 1102 (1968)).

and misleading advertising.[18] While the State Bar of California has an interest in protecting the citizens of the State from attorney practices which are '[r]life with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud' " (*Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916 at 1922), testimonial radio advertisements are not among such practices and the presumption imposed here is not reasonable related to the promotion of such an interest.

This case involves basically the same state interests alleged to be at stake because of illustrations in *Zauderer*, i.e., that a blanket ban was necessary to ensure against deceptive or manipulative uses of visual media. Yet this Court declined to find those interests substantial enough to permit the "blanket ban" on illustrations. As to the risk that the public would be misled, manipulated or confused because "[a]buses associated with the visual content of advertising are particularly difficult to police . . . ," 471 U.S. at 648, this Court found that such assertions were unsupported by evidence, and that the First Amendment rights at stake were important enough such that the use of illustrations should be policed *on a case-by-case basis*. 471 U.S. at 649. Likewise, the statement by the State Bar Committee which recommended that testimonials be presumed deceptive, etc., is a general argument unsupported by any evidence. Further, there appears no reason why testimonials, like illustrations, cannot be policed on a *case-by-case basis*.

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[18] See State Bar Committee report, Statement of the Case, *supra* at p. 10.

As in *Zauderer, supra*, "the voluminous record in this case fails to reveal a single instance" of actual experience demonstrating the advertisement at issue here was deceptive. 471 U.S. at 660 (Brennan, J., concurring and dissenting). Moreover, the California State Bar Committee Report contains the cursory and "highly speculative" arguments of the type Justice Brennan deemed "an unacceptable substitute for the reasoned evaluation that is required when regulating commercial speech." *Id.* at n. 4.

Unlike the appellant in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), who telephoned one of his potential client's parents, visited one of his potential clients at the hospital and the other at home, concealed a tape recorder and recorded certain conversations with his potential clients, refused to permit one of his clients to repudiate her agreement with him after she agreed to his representation, and received two Bar complaints against him, the Appellant here engaged in no "in person" communications but merely utilized a radio advertisement,[19] and there were *absolutely no consumer complaints against the advertising*.

Admittedly truthful advertising about the availability of routine legal services can hardly be compared with Ohralik's in-person solicitation, especially considering

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[19] Again, it must be emphasized that the statements in the advertisement were extemporaneous and were concededly true and reflected Sharon S.'s actual experience as a client. (See, Jurisdictional Statement, Appendix "D,")

the circumstances surrounding Ohralik's conduct. Oring's advertisement, as in *Bates*, "simply provides information and leaves the recipient free to act upon it or not," (*Ohralik*, 436 U.S. at 457) while Ohralik's "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* and n. 13.

Further, entirely lacking are the difficulties in enforcement of standards attendant with in-person solicitation. Testimonial advertising is *on the air and open to public inspection*. Testimonials do not involve a dangerous "one on one" confrontation between a lawyer and a "distressed" lay person with its attendant – he said this, I said that – problems. 433 U.S. at 466 and n. 28.

Because the interests at stake are not as substantial as those in *Ohralik*, and because this Court, in *Zauderer*, has dispensed with "blanket bans" based on interests asserted by the State here, the California State Bar's evidentiary presumption at issue here is not reasonably related to the promotion of an important State interest.

D. THE PRESUMPTION AT ISSUE IS BROADER THAN REASONABLY NECESSARY TO PREVENT THE PERCEIVED EVIL.

Rule 2-101(D) provides that the Board of Governors of the State Bar shall establish standards as to what communications will be presumed to be false, deceptive or which tends to confuse, deceive or mislead the public. Pursuant to this Rule, the Board determined that testimonials would be included in this category, i.e., the attorney who advertises by a testimonial must bear the

burden of proving that his advertisement is not false, deceptive or misleading.

The presumption at issue violates the principles established by a long line of this Court's decisions. It is not only a more restrictive path than reasonably necessary, it is, in effect, an outright ban because of the difficulties the attorney encounters in proof of his innocence. This Court has stated that *one seeking to uphold a restriction on commercial speech should bear the burden of proving that such speech is unprotected* (see, e.g., *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60, 71 (1983)), where "a more limited restriction on the content of promotional advertising would . . . serve adequately the State's interests." *Central Hudson Gas and Electric Corp.*, 447 U.S. at 570.

The presumption at issue here forces an attorney to produce evidence sufficient to overcome a presumption that his advertisement is false, misleading or deceptive, in an apparent attempt by the State "simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. But, at this Court stated in *Zauderer*:

> "The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on the would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 647.

To place the burden upon an attorney to demonstrate that his advertisement is not false, misleading, or harmful

places the cost of distinguishing the helpful from the misleading upon the attorney, thereby eroding First Amendment protections which this Court has deemed valuable. The effect of shifting the burden of proof constitutes a blanket ban, something this Court has approved only in cases of extreme overreaching. See *Ohralik, supra.*

In seeking to sustain a prophylactic rule against certain forms of advertising in *Zauderer,* the State urged that "it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services." 471 U.S. 644-645. Yet this Court refused to follow that reasoning for several reasons, all of which are applicable here. The statements involved here are easily verifiable and completely accurate.[20] And although distinguishing deceptive from non-deceptive *legal* advertising may not always be a simple task, as this Court has pointed out:

> "Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. . . .15 U.S.C. 45 (a)(1) reveals that distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex

[20] The State Bar of California stipulated that Oring's advertisement was true and reflected his client's actual experience.

> and technical factual issues and the consideration of nice questions of semantics." 471 U.S. at 645.[21]

Thus, *Zauderer* emphasizes that the State should bear the burden of distinguishing the deceptive from the non-deceptive and the helpful from the misleading.

And a recent Federal Trade Commission Staff Report, "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising," 145-149 (1984) concludes that the application of a "false or deceptive" standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally. *Zauderer,* 471 U.S. at 646, n. 13.

Other decisions of this Court are in accord. In *In re R.M.J.* 455 U.S. 191 (1982), this Court affirmed that the " 'preferred remedy is more disclosure, rather than less.' " 455 U.S. at 201. But the presumption at issue here serves to prevent the disclosure of information, rather than promote such disclosure.

Both *In re R.M.J.* and *Shapero* suggest less burdensome alternatives, including disclaimers or filing of a copy of the advertisement with the State so that it can exercise reasonable supervision over the advertising. See *In re R.M.J.* 455 U.S. at 206. Since "[t]here is no indication in the record of a failed effort to proceed along such a less

[21] Yet, the Federal Trade Commission bears the burden of demonstrating that an advertisement is deceptive. See *Montgomery Ward and Co. v. F.T.C.* 379 F.2d 666 (7th Cir. 1967).

restrictive path" (*Id.*), the presumption at issue here is violative of the First Amendment.[22]

In the context of lawyer advertising, the Supreme Court of Wisconsin has interpreted this Court's holding in *In re R.M.J.* as requiring the burden of proof in a lawyer disciplinary proceeding to be borne by the party seeking to impose that discipline. In *In the Matter of Disciplinary Proceedings Against Jack L. Marcus*, 107 Wis.2d 560, 320 N.W.2d 806 (1982), the Wisconsin Supreme Court affirmed an order dismissing complaints of professional misconduct filed against attorneys based on certain newspaper advertising, stating:

> "In light of *R.M.J.*, we interpret [the disciplinary rule] and its predecessor as requiring the party which is seeking to have discipline imposed to bear the burden of proving by clear and satisfactory evidence that the advertisement violates the rule." *Id.*

The California State Bar Committee Report which states that testimonials are inherently deceptive because "past performance of an attorney is no indication of future performance . . . " (Statement of the Case, *supra*) is similar to the ABA's contention in *Shapero* that target mailings could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case. Yet, the *Shapero* Court discarded such an argument, stating:

> "merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated

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[22] The recently proposed California State Bar Rule (Joint Appendix C) permits testimonial advertising so long as it is not misleading and includes a disclaimer.

> abuses or mistakes does not justify a total ban on that mode of protected commercial speech."

Similarly, even if testimonials present lawyers with opportunities for isolated abuses, that, in itself, cannot not justify their total ban or anything other than a narrowly tailored restriction. Since the presumption at issue here is not narrowly tailored and since this Court has suggested several more narrowly tailored restrictions, none of which were tried before the implementation of this presumption, Rule 2-101(D) violates the First Amendment protections afforded commercial speech.

II.

THE EFFECT OF THE PRESUMPTION THAT TESTIMONIALS ARE MISLEADING FAILS TO AFFORD AN ATTORNEY DUE PROCESS BECAUSE IT REQUIRES THE ATTORNEY TO OVERCOME AN ALMOST INSURMOUNTABLE BURDEN OF PROOF.

At the threshold, it must be remembered that disciplinary proceedings brought against an attorney are adversary proceedings of a quasi-criminal nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968).[23] Even where the disciplinary authorities have imposed a punishment of less than a public reprimand on a lawyer, this Court has not hesitated to reverse where an attorneys constitutional rights have been violated (See, *In re R.M.J.*, 455 U.S. at 198; *In re Primus*, 436 U.S. 412, 421; *Bates v. State Bar of Arizona*, 433 U.S. at 358; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 669, Justice Brennan concurring).

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[23] See, also, *Giddens v. State Bar* 28 Cal.3d 730, 734, (1981); Witkin, *California Procedure*, (3d Ed. 1985) Vol. 1, page 526.

Here, as in *Zauderer*, the public reproval imposed on Appellant exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Oring as an unethical attorney who has violated his oath of office, results in publication of the public reproval in the "California Lawyer", the official journal of the State Bar of California, and "may otherwise be made public" (Rules of Procedure of the State Bar, Rule 615). Moreover, one who has been previously disciplined is subject to greater discipline in the event of any subsequent offense, and, in the event the lawyer has suffered two prior impositions of discipline, he may be disbarred no matter how minor the nature of the offenses (Rules of Procedure of the State Bar, Standards for Attorney Sanctions for Professional Misconduct, Standards 1.7(a) and 1.7(b)).

It is quite clear that where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, due process rights must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The presumption at issue in this case deprives an attorney of his due process rights. As in *Speiser v. Randall*, 357 U.S. 513 (1958):

> "The vice of the present procedure is that, where the particular speech falls close to the line separating the lawful and the unlawful, the possiblity of mistaken factfinding–inherent in all litigation–will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . *How can a claimant . . . possibly sustain the burden of proving the negative of these complex factual elements?* In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' " 357 U.S. at 562; emphasis added.

The *Speiser* reasoning applies with equal force here. Undoubtedly, California's presumption that testimonial advertising in misleading is an attempt to avoid these constitutional restrictions.

Since "[t]he threat of sanctions may deter the [exercise of freedoms] almost as potently as the actual application of sanctions" (*N.A.A.C.P. v. Button*, 371 U.S. 415 at 433 (1963)), the threat of discipline because of the existence of the presumption that any testimonial is false and misleading deters the exercise of First Amendment freedoms just as would an outright ban.[24]

Further, the presumption involved here violates due process considerations by ensuring that an attorney can be disciplined *even when the evidence indicates that it is as*

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[24] Under the California Rule in question here, the lawyer who utilizes testimonial advertising is forced to gamble and risk his license in the event that he fails to overcome the weight of the presumption that such advertising is misleading.

likely as not that his advertising is not misleading. Mullany v. Wilbur, 421 U.S. 684 at 703 (1975).

Having observed that attorney disciplinary proceedings are quasi-criminal in nature, the reasoning of *In re Winship,* 397 U.S. 358, 364 (1970) is persuasive:

> "It is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty . . . without convincing a proper factfinder of his guilt with utmost certainty."

Since the presumption at issue permits the State Bar to "convict" an attorney *in the absence of facts demonstrating that a testimonial advertisement is misleading,* it cannot withstand Constitutional scrutiny.[25]

Clearly, the shifting of the burden of proof to the attorney charged with a disciplinary offense cannot pass constitutional muster. Such a procedure is grossly unfair

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[25] Commentators have noted that it might be required that the advertiser be required to produce preliminary supporting evidence for his claim, but that this seemed a drastic step and one that may raise the type of constitutional issue discussed by Ira M. Millstein in his article entitled "The Federal Trade Commission and False Advertising", 64 *Columbia Law Review* 469 (1964) (See, Weston, *"Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor"* 64 *Federal Bar Journal* 562. Additionally, sustaining the burden of proving that a testimonial is not misleading would be difficult, if not impossible:

> "How to substantiate that a product's flavor 'comes through' or that it truly gives a 'natural color' or that only her hairdresser can tell whether 'she does or does not' may tax ingenuity." Austern, *What is "Unfair Advertising"? Food, Drug and Cosmetic Law Journal*-December, 1971, 659 at 661.

and deprives the attorney of the due process to which he is entitled.

III.

APPELLANT HAS NOT WAIVED ANY RIGHT TO URGE HIS CONSTITUTIONAL CHALLENGES NOW BEFORE THIS COURT.

The State Bar's claim that Appellant stipulated to the same degree of discipline that might ultimately be imposed on his then partner, David A. Grey, and that, therefore, he should not be able to independently make the constitutional challenges he has now made (Motion to Dismiss or Affirm, p. 13-14), simply fails to take into consideration the facts of this case.

The stipulation between the State Bar and Appellant specifically stated "the within stipulation as to recommended discipline is not binding upon the California Supreme Court." Jurisdictional Statement, Appendix "D," App. 10.

Thus, the stipulation itself provided that it was not binding upon the California Supreme Court, i.e., it was subject to independent review by that Court. In any event, a stipulation imports "no commitment to the recommended discipline" *Giovanazzi v. State Bar,* 28 Cal.3d 465, 471, 169 Cal.Rptr. 581 (1980). Thus, neither party can, by stipulation, waive their right to appeal State Bar Court decisions.

Even the letter imposing the public reproval sent by the State Bar to the Appellant, along with enclosures governing petitions for review by the Supreme Court of California, and signed by the "Presiding Referee," states:

"You may, if you so desire, seek Supreme Court review of the State Bar Court's action." (See Joint Appendix "D", J.A. 12.)

Since the stipulation entered into between the parties was merely a "recommended" stipulation and was not binding upon the California Supreme Court, it could not be binding upon this Court. The State Bar's contention is without merit, especially considering that in regards to fundamental rights, this Court has stated:

> "Indeed, in the civil no lesser than the criminal area, 'courts indulge every reasonable presumption against waiver.' " *Fuentes v. Shevin*, 407 U.S. 67 at 94, n. 31 (1972).[26]

IV.

CONCLUSION

The radio advertisement involved here was a statement by a client that a law firm had been concerned with her legal interests and had protected those interests fully. The advertisement is devoid of any hyperbole or any laudatory adjectives, any statements of the amount recovered, or any reference to any other attorneys. As such, the ad was neither deceptive nor misleading. The statements were admittedly true.

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[26] Even assuming, arguendo, that counsel's comments during the Hearing Department proceedings (at which Oring was not present (See, Transcript, Joint Appendix "B", J.A. 3-6.) could in some way be construed as an attempt to waive Oring's right to appeal, it is clear that under California law, counsel cannot waive appeal rights on behalf of his client. See, *Blanton v. Womancare, Inc.*, 38 Cal.3d 396 at 404-405 and n. 7, 212 Cal.Rptr. 151 (1985), *Linsk v. Linsk*, 70 Cal.2d 272, 276-277, 74 Cal.Rptr. 544 (1969).

The First Amendment commands that "restrictions upon . . . advertising may be no broader than reasonably necessary to prevent the deception." (*In re R.M.J.*, 455 U.S. 203). Since the presumption enacted by California is a very broad restriction, and since California did not attempt to restrict advertising by less onerous means such as the use of a disclaimer, explanation, or submission of the advertisement for prior review and approval as suggested by this Court (See *Bates, supra*, 433 U.S. at 375; *Shapero*), the presumption against testimonial advertising, and its application to the Appellant herein, cannot survive this Constitutional challenge.

Based on the foregoing, the judgment of the Supreme Court of California should be reversed.

DATED: August 22, 1988

Respectfully submitted,

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